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No. 86-1829

In the Supreme Court of the United States

OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Petitioner contends that the court of appeals erred in vacating a rule promulgated by the Secretary of Transportation under the Merchant Marine Act, 46 U.S.C. 1101 *et seq.*, on the ground that the rule lacked "a concise general statement of [its] basis and purpose," as required by the Administrative Procedure Act (APA), 5 U.S.C. 553(c). We share petitioner's reservations about the correctness of the court of appeals' decision. We do not believe, however, that plenary review by this Court is warranted. The Department of Transportation's Maritime Ad-

ministration has recently promulgated a new rule in response to the court of appeals' decision. See 52 Fed. Reg. 23522, 23536 (1987) (to be codified at 46 C.F.R. 276.3). As a result, the importance of the former rule is now diminished, and petitioner's challenge to it, at least as a practical matter, is now moot.

1. This case concerns the validity of a "payback rule" promulgated by the Secretary of Transportation in 1985. That rule allowed certain tanker vessels to engage in domestic commerce upon their repayment, with interest, of the federal subsidies that they had previously received to promote their participation in foreign commerce. See 50 Fed. Reg. 19178 (1985) (codified at 46 C.F.R. 276.3 (1986)). Under the Merchant Marine Act, which authorizes the federal government to subsidize the construction and operating costs of American ships that will operate in foreign commerce (see 46 U.S.C. 1151-1152, 1171-1172), a subsidized ship is not permitted to operate in domestic commerce except in limited circumstances (see 46 U.S.C. 1156). In *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980), this Court upheld the Department of Transportation's authority under the Merchant Marine Act to lift this restriction on domestic shipping in exchange for repayment of the federal subsidy.

In 1980, the Maritime Administration promulgated a rule authorizing permanent lifting of domestic trade restrictions for certain tanker vessels that repaid their subsidies with interest. See 45 Fed. Reg. 68393, 68394 (1980). Several competing domestic tanker owners, including several of the respondents in this case, challenged the 1980 rule, and the court of appeals set it aside. According to the court of appeals, the 1980 rule did not include an adequate statement of its basis and

purpose, as required by the APA, 5 U.S.C. 553(c). See *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982).

In January 1983, the Secretary of Transportation published a new notice of proposed rulemaking with a view to permitting all subsidized U.S. tanker vessels to enter the domestic trade permanently upon repayment of the unamortized subsidy plus compound interest from the date of its receipt. 48 Fed. Reg. 4408. The notice reviewed the entire history of subsidy repayment and the comments received on earlier Maritime Administration rulemakings concerning this question. It invited further comment on these issues and assessed the economic impact of allowing the owners/operators of these vessels to determine whether to repay their subsidies. Finally, the proposed rule relied on this Court's conclusion in *Seatrain* (444 U.S. at 589-590) that permanent release of domestic trading restrictions upon full repayment of subsidies would put the once subsidized vessels on a "footing equal to that of vessels already in that trade," and therefore would be superior to the routine practice of allowing those subsidized vessels to participate under temporary releases. See 48 Fed. Reg. 4409 (1983).

In May 1985, the Secretary promulgated a final payback rule, which is the subject of this litigation. The 1985 final rule, like the 1983 proposed rule, permanently lifted domestic trade restrictions for any tanker vessel built with a federal construction subsidy upon repayment of the unamortized subsidy plus compound interest from the date of its receipt, provided that repayment occurred during a one-year period ending on June 6, 1986. See 50 Fed. Reg. 19170, 19173, 19178 (codified at 46 C.F.R. 276.3 (1986)).

The district court sustained the 1985 rule (Pet. App. 16a-31a), but the court of appeals again reversed (*id.* at 2a-15a). Although it rejected respondents' argument that the Secretary lacked statutory authority to promulgate the rule, the court of appeals set aside the 1985 rule on the same ground that it had set aside the 1980 rule, viz., the absence of an adequate statement of basis and purpose, as required by the APA. While concluding that the 1985 rule should be vacated (Pet. App. 15a), the court did not effectuate that result immediately. Instead, it withheld issuance of its mandate until July 16, 1987, "to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade" (*ibid.*).

On April 15, 1987, the Maritime Administration proposed a revised rule in response to the court of appeals' decision. See 52 Fed. Reg. 12199 (1987). On June 22, 1987, the Maritime Administration published a final new rule, which supersedes the 1985 rule. 52 Fed Reg. 23522, 23536 (1987). The 1987 rule includes a still more comprehensive statement of its basis and purpose, which addresses the issues identified by the court of appeals, and it permanently lifts domestic trade restrictions for those tanker vessels (four in number) that had repaid their federal subsidies pursuant to the now-rescinded 1980 and 1985 rules.

2. We share petitioner's view that the Secretary's 1985 rule adequately explained its basis and purpose, and that the court of appeals' decision to the contrary rests on an unduly expansive application of the APA. As this Court stated in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (citation omitted) "[a]dministrative decisions should be set

aside * * * only for substantial procedural or substantive reasons as mandated by statute * * *." Consistently with the APA's requirements, the 1985 rule "cogently explain[ed]" the Secretary's action (see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 48 (1983)) and fully considered and rejected all reasonable alternatives, including the actions taken in prior rulemakings on this subject (see *Vermont Yankee*, 435 U.S. at 551).

We do not believe, however, that review by this Court is warranted at this time. Since the petition in this case was filed, the Maritime Administration has promulgated in final form a new payback rule that replaces the 1985 rule. The promulgation of this new rule obviously diminishes the importance of the 1985 rule and renders moot, at least as a practical matter, the legal challenge that is the subject of this petition. In these circumstances, review by this Court of the validity of the 1985 rule is not warranted.*

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1987

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* The focus of any future litigation should be on the validity of the 1987 rule, and that litigation must be brought in federal district court in the first instance. Of course, if the court of appeals were to set aside the 1987 rule, certiorari might then be warranted. We note that the Independent U.S. Tanker Owners Committee, one of the respondents here, has already filed a complaint in federal district court challenging the validity of the 1987 rule. See *Independent U.S. Tanker Owners Comm.* v. *Dole*, No. 87-1685 (D.D.C. (filed June 19, 1987)).

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